FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

PAUL JOSEPH "JAY" KELLEY, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0410-CV-461
	)	
DANIEL T. TANOOS,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0212-CT-9399

January 4, 2006

OPINION ON REHEARING - FOR PUBLICATION

ROBB, Judge

Daniel Tanoos was sued by Paul Kelley for defamation and the trial court granted

summary judgment in his favor. On appeal, we held that the trial court erred in granting summary judgment for Tanoos because a genuine issue of material fact existed as to whether Tanoos made his statements with malice and whether Kelley had been damaged. Kelley v. Tanoos, Cause No. 84A01-0410-CV-461 (Ind. Ct. App., Aug. 18, 2005). In holding there was a genuine issue of material fact regarding Kelley's damages, we relied upon the presumption of damages for defamation *per se*, and held that Tanoos' evidence that Kelley was not in fact damaged only converted the presumption of damages into a reasonable inference of damages, rather than establishing the absence of damages as a matter of law. Tanoos petitions for rehearing of our opinion.[1]

Tanoos first alleges that there is a factual error in our opinion. We stated, "Sinclair suggested [he and Tanoos] get together. Tanoos called Sinclair and they set up a lunch. Tanoos then went to the police and told them about the meeting, indicating that Kelley and his involvement in the crime would be a topic of conversation." Slip op. at 3-4. Tanoos claims that he did not reach out to Sinclair until after he spoke with police. Our review of the record reveals that Tanoos is technically correct. Sinclair suggested lunch, Tanoos called the police, and the police told him that if Sinclair wanted to discuss school business, they were not interested. Tanoos contacted Sinclair, found out that Kelley would be a topic of discussion, and again contacted the police. Our recitation of the facts left out the initial conversation between Tanoos and the police. However, as the police did nothing more

[1] Tanoos subsequently made a submission of additional authority. Kelley then filed a response to that submission, claiming that the additional authority should be disregarded as irrelevant, and Tanoos filed a motion to strike Kelley's response. We allow the filing of additional authority where warranted, and although there is no rule prohibiting the filing of a response, allowing the submission of additional authority after

during that conversation than tell Tanoos they were only interested if Kelley was to be a subject of conversation, the omission does not affect our decision.

Substantively, Tanoos contends that our opinion reversing summary judgment and remanding for jury trial on an inference or presumption of damages does not represent sound public policy and that we should instead follow several other states that have abolished the presumption of damages in defamation cases.

Tanoos notes that none of the cases cited in our opinion deal specifically with the use of a presumption in a defamation case. We agree, and we specifically noted in our opinion that this was an issue of first impression. Thus, a review of the law of presumptions in other areas was both necessary and appropriate. Tanoos also notes that transfer has been granted by our supreme court on one of the cases we cited, thus vacating the opinion. See Shultz v. Ford Motor Co., 822 N.E.2d 645, 653 (Ind. Ct. App. 2005), trans. granted (Ind., Aug. 25, 2005). However, we note that we did not cite to Schultz for any proposition novel to that case, and any statements attributed to Schultz are supported by other sources, as well.

Tanoos contends that our decision is not "sound public policy." Appellee's Petition for Rehearing at 5. However, as stated in our opinion, a presumption "is a declaration of public policy that if a litigant presents evidence of a specific set of facts, then an additional fact will be presumed to exist." Slip op. at 9 (quoting 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE § 301.101 (2d ed. 1995)). Thus, the public policy decision has already been made in establishing the presumption in the first place.

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briefing is not intended to open the case to further argument by either side. Nonetheless, we have given the additional authority the consideration it is due, and deny Tanoos' motion to strike Kelley's response.

Here, Kelley has shown the required set of facts – he has proven defamatory imputation and publication and he has raised at least a question of fact as to malice. Thus, damages can be presumed. That Tanoos has come forth with evidence rebutting the presumption of damages only converts the presumption of damages into a reasonable inference of damages that at trial will be considered with all other evidence. See 12 MILLER § 301.102. As Kelley is the non-movant, and all reasonable inferences are to be construed in his favor at the summary judgment stage, the grant of summary judgment for Tanoos was inappropriate.

Subject to the above clarifications, we reaffirm our original opinion in its entirety.

KIRSCH, C.J., and BAILEY, J., concur.